

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

Babulal Vs. State of Rajasthan
(S.B. CRIMINAL APPEAL NO.217/1988)

S.B. Criminal Appeal under Section 374 (2)
Cr.P.C. against the judgment dated 30.4.1988
passed by the Additional Sessions Judge,
Barmer in Sessions Case No.10/1988.

Date of Judgment:

APRIL 13,2007

P R E S E N T

HON'BLE MR.JUSTICE BHANWAROO KHAN

Mr.P.N.Mohanani, for the appellant

Mr.L.R.Upadhyaya, Public Prosecutor

BY THE COURT:

1. The appellant accused has preferred this appeal against the judgment of Additional Sessions Judge, Barmer dated 30.4.1988 whereby he was convicted of offence under Section 18 of the Narcotics,

Drugs & Psychotropic Substances Act (in short the N.D.P.S. Act) and sentenced to undergo 10 years rigorous imprisonment and a fine of Rs. 1 Lac; in default of payment to further undergo 1 year rigorous imprisonment.

2. The prosecution case as unfolded during the trial is as follows:-

The S.H.O. Police Station, Bayatu, Poonam Chand received an information at about 7:00 A.M. on 21.6.87 to the effect that one or two persons having illegal opium in their possession are selling opium in the territory of village Somesara. The information was recorded by him.

3. After receipt of the information he along with police officials Sanwanta Ram, Tejdan, Chunnilal, Raju Singh and Natha Ram, set out for village Somesara, where at about 3:00 P.M. a person was seen coming towards Somesar, who after seeing the police party, tried to fled away. They intercepted him and inquired about his name and his presence at the place to which he disclosed his name as Babulal S/o Magla Ram by caste Vishnoi resident of Doli, but about his presence

no satisfactory explanation was putforth. He made search of Babulal in presence of Motbirs Rekha Ram and Bhav Singh. Accused Babulal was having a dusty coloured bag which when checked, inside it one white plastic bag was found containing two black coloured opium bars. There was one more sky coloured plastic bag, which was found containing opium milk. On being asked about licence or permit for having opium and opium milk the accused replied in negative. On weighing, 750 gms of opium bars and 500 gms of opium milk was found in those plastic white and sky coloured bags respectively, out of which two samples of 30 gms each of opium and opium milk were taken. All these four packets were sealed separately. A case was registered after coming to the police station under Section 18 of the N.D.P.S. Act. After usual investigation police submitted a challan against accused Babulal. The trial court after completing the trial convicted and sentenced Babulal accused as aforesaid.

4. In support of the appeal learned counsel for the appellant argued that this is a case wherein prosecution has not tendered evidence of any independent witness. Only police officials have given

the statements in support of the prosecution and rest of two independent witnesses before whom the opium was recovered, are full of contradictions and lack corroboration of the statements given. The Investigating Officer has not complied with the statutory provisions of Section 42, 50 & 55 of the N.D.P.S. Act. The statements of the witnesses about the alleged search of the accused is full of infirmities and contradictions. So reliance cannot be placed on the evidence tendered. The record prepared and information reduced to writing by the Investigating Officer on getting the information from the informant regarding movements of the accused has neither been produced in court nor has been sent to the higher authorities in compliance of Section 42 of the N.D.P.S. Act.

5. Per contra, the learned Public Prosecutor supported the judgment and argued that the oral evidence tendered is reliable & corroborative. Simply the prosecution witnesses happens to be police officials their corroborative and believable evidence cannot be rejected outrightly. The illegal contraband was seized from the possession of the accused. This is not a case of personal search. So no compliance of whatsoever is

to be made by the Investigating Officer under Section 50 of the N.D.P.S. Act. The forensic report also reveals that the recovered contraband is opium, which amounts that an offence has been committed by the accused having possession of illegal opium. The trial court rightly convicted and sentenced the accused.

6. As far as the question of oral evidence goes, P.W.7 Poonam Chand the Investigating Officer has stated that on 21.6.87 he received a secret information from an informant that one or two persons are selling opium in the territory of Village Somesar. An entry of the same was made in the Rojnamcha and thereafter along with the police officials he set out for Somesar. At about 3:00 P.M. a person was seen coming to Somesar. On seeing the police vehicle the person started running. They intercepted him and inquired about his whereabouts and his presence in the area to which he could not satisfy the police party. He told his name as Babulal S/o Mangla Ram Vishnoi resident of village Doli. The accused was having a dusty bag in his hand. When it was opened in presence of Motbirs P.W.2 Rekha Ram and P.W.1 Bhav Singh, there was a white plastic bag containing black coloured pieces of opium. When

weighed, it came out to be 750 gms. Opium. There was also another sky coloured plastic bag in the dusty bag in which 500 gms of opium milk was found in presence of the Motbirs Rekha Ram and Bhav Singh. Two separate samples of opium and opium milk each weighing 30 grams were taken for chemical examination and rest of the opium and opium milk and the samples were sealed in four packets in presence of Motbirs. The accused was arrested and a challan was filed. Rest of the police officials P.W.4 Natha Ram, P.W.3 Raju Singh have corroborated this oral evidence about the recovery.

7. It is of course true that both the independent Motbirs P.W.2 Rekha Ram and P.W.1 Bhav Singh's version about the recovery lacks corroboration with other witnesses. As per their statements, the police were having the custody of the accused when they reached on the spot. As per P.W.1 Bhav Singh, when he reached on the sport, the S.H.O. Was in possession of the opium and opium milk. So it can safely be inferred that contraband was not recovered from the possession of the accused in his presence. P.W.2 Rekha Ram has stated that while he was going to his house he met 4-5

police officials, who were in the company of P.W.1 Bhav Singh and the accused was surrounded by them. There in his presence the opium was recovered from the accused Babulal. The recovered opium was sealed in his presence and a memo of recovery Ex.8, was prepared. If P.W.2 Rekha Ram's version is seen along with statements of police officials P.W.3 Raju Singh, P.W.4 Natha Ram and P.W.7 Poonam Chand, it is proved that police recovered a bag from the possession of accused, which was not corroborated the prosecution about the recovery of opium in their presence.

8. P.W.6 Hukam Singh stated that he obtained the sealed samples from P.W.3 Raju Singh and took the same to the S.P. Office from where after obtaining the duly sealed packets he took the same for depositing it in F.S.L., Jaipur. He handed over the packets at the F.S.L., Jaipur and obtained a receipt in this regard. P.W.5 Jethu Singh and P.W.3 Raju Singh have supported his version. The FSL report Ex.P 10 certifying the material as after examination is that of opium. So the seized contraband was in safe custody in sealed position and was sent to F.S.L. In the same position meaning thereby that Section 53 was complied with and taken

care of.

9. This was the oral evidence produced by the prosecution. The main argument of the counsel for the appellant is about the non-compliance of Section 42, 50 & 55 of the N.D.P.S. Act stating that when the S.H.O. Was having prior information about commission of offence and he recorded the same in the Rojnamcha then it was his prime duty to have sent the information to his higher authority under Section 42(2), but he failed to do so and non-compliance of this section is fatal. Secondly when person's personal search is conducted by the investigating agency it was the prime duty of the police officer to have apprised the accused about his right to choose whether the accused is likely to be searched by the police officer in presence of nearest available Magistrate or a Gazetted Officer. But this was also not done by the investigating agency and the accused has been deprived of his valuable right about the search. Thirdly, the recovered contraband opium has not been produced in court which is also fatal to the prosecution case. The recovery so made if it is proved, cannot sustain the conviction given by the trial court. The learned counsel has cited 2004 SCC

(Cri.) 607 (Krishan Kanwar vs. State of Raj.), 2007 Cr.L.J. 880 880 (Dilip & Anr. Vs. State of M.P.), 2003 Cr.L.J. 4985 (Jitendra & Anr. vs. State of M.P.) in support of his contentions.

10. Now, it is well settled by catena of judgments of the Apex Court that non-compliance of Section 42, 50 of the N.D.P.S. Act do not vitiate the trial but it causes prejudice to the accused and renders the search illegal. The conviction and sentence of the accused based solely on the recovery of contraband cannot be sustained unless the provisions under Sections 42, 50 of the N.D.P.S. Act are complied with.

11. Section 42 enables certain officers duly authorised to enter into and search any building, conveyance or enclosed place without warrant, if officer has reason to believe from personal knowledge or information given by any person and has taken down in writing any offence under Chapter IV of the N.D.P.S. Act has been committed, he may between sunrise and sunset do the act enumerated in (a) (b) (c) (d) of Clause (1). Sub Clause (2) mandates that if officer has taken down in writing under Sub Clause (1) he shall

forthwith send a copy thereof to his superior officer. In State of Punjab vs. Baldev Singh reported in 1999(6) SCC 172 it has been held that any police official without any prior information conducts search under Code of Criminal Procedure and causes arrest of a person in the normal course of investigation in which an offence is committed and on completion of that search if any contraband under the N.D.P.S. Act is recovered the requirement of Section 42, 50 will not be attracted. But if he has prior information, and has taken down it in writing or records grounds for his belief then it is a must for the officer to comply with Section 42(2) of the N.D.P.S. Act and to send a copy of information within 72 hours to his superior. In State of Punjab Vs. Balbir Singh reported in 1994(3) SCC 299, it has been held,

“Under Section 42(2) the empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.”

12. A bare perusal of the oral evidence and the statement of the Investigating Officer P.W.7 Poonam

Chand clearly reveals that he took down the information on the receipt of information from the informant but the same information was never sent to the higher police officers meaning thereby a total non-compliance of Section 42(2). Of course in his cross examination he has admitted that by wireless after recovery of the opium from the possession of the accused the information was sent through wireless but the copy of which is not available with him, neither it has been produced in the Court. Section 42(2) specifically required that the information has to be sent out by the official within 72 hours with the copy to his immediate superior officers. But it is clear that this provision has not been complied with by the Investigating Officer deliberately and there was no situation for the Investigating Officer to have not complied with this provision.

13. Section 50 of the N.D.P.S. Act prescribes the condition under which search of a person shall be conducted. It provides that if any suspect person is searched, then he shall be made aware of his right about the search to be taken before a Gazetted Officer or before Magistrate, if the accused desire so, the

search should be taken in presence of either of the officers mentioned. A bare reading of Section 50 shows that it only applies in case of a personal search. It does not extend to search of a vehicle, container or a bag or premises. The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrast to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh's case(supra).

14. In the instant case, the accused was having a dusty bag in his hand, which was taken by the Investigating Officer. So it cannot be said that the accused person was searched by the police official. The bag was in his physical possession only and this cannot be equated with the recovery from the person of the accused by a personal search. In Gurbax Singh vs. State of Haryana reported in 2001 Cr.L.J. 1166 there was a recovery from the plastic bag belonging to the accused on which accused was found to be sitting in the railway compartment. It was held that Section 50 of the N.D.P.S. Act is not applicable. Section 50 comes into play only when a personal search of the person of the accused is made by Investigating Officer and it is

clearly distinguishable from the search made from the bag, container, suitcase or premises. So in the instant case, the personal search of the accused was not made because the recovery is from a bag, which was in accused's hand. In this situation the question of Section 50 coming into play will not arise and the learned counsel's argument about non-compliance will be of no avail.

15. The arguments of the learned counsel for the appellant about the non-compliance of Section 55 of the N.D.P.S. Act is of no avail for the accused, as nothing could be shown as to how there was violation of Section 55. The contraband was deposited in Malkhana in sealed condition and from there to F.S.L. In sealed situation as the report Ex.P10 and the testimony of prosecution witnesses shows that sample was received in sealed condition and intact.

16. So far as the compliance of Section 42(2) of N.D.P.S. Act is concerned, it is clearly borne out that it has not been complied with and no information of whatsoever after received and reduced to writing the information by the S.H.O. was sent to his higher police officers. Along with this the contraband article seized was not produced in the court. Non-compliance or

contravention of Section 42 would affect the prosecution and vitiates the conviction as this is provision to be followed and complied with strictly. The non-compliance is fatal for the prosecution and completely vitiates the conviction. In such circumstances the illicit article seized during the illegal search cannot be used as evidence or proof of unlawful possession of that article and cannot entitle the prosecution to raise a presumption under Section 54 of the N.D.P.S. Act.

17. Above being the position and the discussion, reveals that the non-compliance of the provisions of the N.D.P.S. Act entitles the accused for acquittal and appeal deserves to be accepted.

18. Resultantly, the appeal of the accused is allowed and the conviction and sentence passed by the Additional Sessions Judge, Barmer vide order dated 30.4.1988 is set aside. The accused is on bail. His bail bonds stand cancelled.

(BHANWAROO KHAN) J.

BKS/-